STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 19, 2003
v	No. 238556 Washtenaw Circuit Court
GEORGIO JOSHUA MACK, Defendant-Appellant.	LC No. 01-00093-FC

Before: Neff, P.J., Fort Hood and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right from jury trial convictions of armed robbery, MCL 750.529, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. Defendant was sentenced to 51 to 180 months' imprisonment for armed robbery, 24 months' imprisonment for felony-firearm, and 12 to 60 months' imprisonment for felon in possession of a firearm. We affirm.

I

On appeal, defendant first argues he was deprived of his due process rights when his prior conviction for receiving and concealing stolen property was used to impeach his credibility as a witness. We disagree.

Defendant contends receiving and concealing stolen property does not contain an element of theft, as required for admission pursuant to MCR 609(a)(2). Further, defendant maintains, even if the crime of receiving and concealing stolen property does contain a theft element, its prejudicial effect outweighed its probative value, in contravention of MCR 609(a)(2)(B) and MCR 609(b).

We review a trial court's decision to allow impeachment by evidence of a prior conviction for an abuse of discretion. *People v Coleman*, 210 Mich App 1, 6; 532 NW2d 885 (1995). This Court finds "an abuse of discretion only if an unprejudiced person, considering the facts upon which the trial court made its decision, would conclude that there was no justification for the ruling made." *People v Miller*, 198 Mich App 494, 495; 499 NW2d 373 (1993), citing *People v Rockwell*, 188 Mich App 405, 410; 470 NW2d 673 (1991).

"A witness' credibility may be impeached with evidence of prior convictions, MCL 600.2159 . . . , but only if the criteria set forth in MRE 609 are satisfied." *People v Nelson*, 234 Mich App 454, 460; 594 NW2d 114 (1999). In pertinent part, MRE 609(a) provides:

> For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross examination, and
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> (1) the crime contained an element of dishonesty or false statement, or
>
> (2) the crime contained an element of theft, and
>
> (A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and
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> (B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.

Defendant's first argument, that receiving and concealing stolen property is not a theft crime, is without merit. Although we conclude receiving and concealing stolen property is not necessarily a crime of dishonesty, it is, for purposes of MRE 609, a theft crime. See *People v Clark*, 172 Mich App 407, 418-420; 432 NW2d 726 (1988). Thus, we must consider the balancing test set forth in *People v Allen*, 429 Mich 558, 605-606; 420 NW2d 499 (1988). As the *Allen* Court explained, the trial judge has discretion to admit evidence of prior convictions for theft crimes that are punishable by more than one year's imprisonment. *Id*. at 605-606. Specifically,

> the trial judge [may] exercise his discretion in determining the admissibility of the evidence by examining the degree of probativeness and prejudice inherent in the admission of the prior conviction. For purposes of the probativeness side of the equation, only an objective analysis of the degree to which the crime is indicative of veracity and the vintage . . . of the conviction [should] be considered, . . . not either party's need for the evidence. For purposes of the prejudice factor, only the similarity to the charged offense and the importance of the defendant's testimony to the decisional process [should] be considered. The prejudice factor would, of course, escalate with increased similarity and increased importance of the testimony to the decisional process. Finally, unless the probativeness outweighs the prejudice, the prior conviction [should] be inadmissible. [*Id*.]

"For purposes of the probative value determination required by [MRE 609] (a)(2)(B), the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity." MRE 609(b). "For those theft convictions occurring less than ten years prior to the relevant case, the vintage of the prior conviction and the defendant's behavior subsequent to that conviction are relevant to probativeness." *Allen*, *supra* at 606 n 32. In the instant case, defendant was convicted of receiving and concealing stolen property in 1999;

therefore, his conviction was only two years old at the time of trial. Thus, evidence of defendant's prior conviction may be probative of defendant's veracity at trial.

Under MRE 609(b), "if a determination of prejudicial effect is required, the court shall consider only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify." Receiving and concealing stolen property, MCL 750.535, is classified under the "stolen, embezzled or converted property" section of the Michigan Penal Code, and categorized as a crime against property in the Michigan Sentencing Guidelines Act, MCL 777.16z. Conversely, armed robbery, MCL 750.529, is classified under the "robbery" section of the Michigan Penal Code, and categorized as a crime against a person in the Michigan Sentencing Guidelines Act, MCL 777.16y. We find no error with the trial court's conclusion that receiving and concealing stolen property was dissimilar to the charged offense of armed robbery, thereby reducing the prejudicial effect of defendant's earlier conviction. Further, we conclude the trial court did not abuse its discretion in admitting evidence of defendant's prior conviction for receiving and concealing stolen property for purposes of impeachment.

II

Next, defendant argues the trial court abused its discretion in denying defendant's motion for a mistrial after an investigating officer testified during direct examination that defendant became a potential suspect in the instant offense while the officer was investigating him as a suspect in a different crime. We disagree.

The decision whether to grant a mistrial due to an unresponsive answer rests in the sound discretion of the trial court, and that decision will not be disturbed on appeal absent an abuse of that discretion. *People v Holly*, 129 Mich App 405, 415; 341 NW2d 823 (1983). "Error requiring reversal results only where a trial judge's denial of a defendant's motion for mistrial is so grossly in error as to deprive a defendant of a fair trial or to amount to a miscarriage of justice." *Id*.

"Generally, a volunteered and unresponsive answer to a proper question is not cause for granting a motion for mistrial." *Id*., citing *People v Kelsey*, 303 Mich 715; 7 NW2d 120 (1942); *People v Stinson*, 113 Mich App 719; 318 NW2d 513 (1982). "This is especially true where the defendant has rejected the opportunity to have the jury charged with a cautionary instruction." *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988). However, this Court scrutinizes unresponsive remarks by police officers "to make sure the officer has not ventured into forbidden areas which may prejudice the defense." *Id.*, citing *People v Page*, 41 Mich App 99; 199 NW2d 669 (1972).

In the instant case, the investigating officer's answer to the prosecutor's question was unresponsive and volunteered. As the trial court noted, the reference was fleeting and was not emphasized to the jury. Indeed, it was only on cross-examination by defense counsel that more information regarding defendant's connection to a separate criminal incident was elicited. The trial court offered to give a cautionary instruction or to allow re-cross-examination, and defense counsel declined. Therefore, the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

III

Finally, defendant claims he was denied his right to effective assistance of counsel, because defense counsel appeared to be unprepared, and did not subpoena a surveillance tape from a party store which may have provided exculpatory evidence for defendant. We disagree.

Because he failed to make a testimonial record in the trial court in connection with a motion for a new trial or an evidentiary hearing, defendant did not preserve this issue for appeal. *People v Sabin (On Sec Rem)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). However, because the record contains sufficient detail to support defendant's claim, we will review this issue. *Id*.

To claim a that he was denied the effective assistance of counsel, defendant "must establish that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different." *Id*. at 659, citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), and *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). There is a strong presumption that the assistance of defendant's counsel was sound trial strategy, and defendant must show that, but for his counsel's error, the trial's outcome would have been different. *Id.*, citing *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den 513 US 1121; 115 S Ct 923; 130 L Ed 2d 802 (1995).

Defendant's first argument that defense counsel appeared unprepared is without merit. Defense counsel's performance did not fall below an objective standard of reasonableness. *Sabin, supra* at 659. After defendant informed defense counsel that there were alibi witnesses, defense counsel filed a notice of alibi, and called those witnesses to testify at trial; therefore, it cannot be said that defense counsel was "unprepared." It is evident that defense counsel would have filed the notice of alibi sooner than ten days before trial, if defense counsel had been made aware of the alibi defense. Defendant has not met his burden of overcoming the presumption that his trial counsel provided effective assistance.

Defendant's next argument that defense counsel was ineffective for his failure to subpoena a surveillance tape that would have placed defendant at a party store at 7:00 p.m., when the armed robbery occurred at 10:00 or 10:30 p.m., is without merit. Defense counsel's performance did not fall below an objective standard of reasonableness. *Sabin, supra* at 659. It is well-settled that decisions regarding what evidence to present are presumed to be a matter of trial strategy, and the failure to present such evidence only constitutes ineffective assistance of counsel when it deprives the defendant of a substantial defense. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "A defense is substantial if it might have made a difference in the outcome of the trial." *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grds 453 Mich 902; 554 NW2d 899 (1996), citing *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Clearly, a surveillance tape that would have placed defendant at a party store at 7:00 p.m., when the armed robbery occurred at 10:00 or 10:30 p.m., was not a substantial defense, and would not have made a difference in the outcome of trial. Again, defendant has not met his

burden of showing that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and defendant is not entitled to relief on this basis. *Sabin, supra* at 659.

Affirmed.

/s/ Janet T. Neff
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello